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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDDERS CORPORATION, FEDDERS INTERNATIONAL CORPORATION, AIRTEMP CORPORATION, AIRTEMP INTERNATIONAL CORPORATION and FEDDERS WORLD TRADE CORPORATION,

Petitioners,

vs.

CHRYSLER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a stockholder of corporations in South Africa and Australia have standing to sue for antitrust damages said to have been suffered by the foreign corporations?

2. Is it a *per se* violation of Section 1 of the Sherman Act for related companies to "conspire to eliminate or destroy a competitor by . . . unfair means", *i.e.*, allegedly by acquiring the assets of the competitor for inadequate consideration?

LIST OF PARTIES AND LISTING PURSUANT TO RULE 28.1

All parties to the proceeding in the court whose judgment is sought to be reviewed were:

Chrysler Corporation,

Plaintiff-Appellant;

and

Fedders Corporation,*
Fedders International Corporation,
Airtemp Corporation,
Airtemp International Corporation,
Fedders World Trade Corporation, and
Interclisa, S.A.,

Defendants-Appellees.

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* Fedders Corporation is the parent corporation of the other petitioners. The petitioners have no other parent corporations, subsidiaries or affiliates except Fedders Corporation and its wholly-owned subsidiaries. Fedders Corporation and its wholly-owned subsidiaries hold minority interests in the securities of other corporations.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDDERS CORPORATION, FEDDERS INTERNATIONAL CORPORATION, AIRTEMP CORPORATION, AIRTEMP INTERNATIONAL CORPORATION and FEDDERS WORLD TRADE CORPORATION,

Petitioners,

vs.

CHRYSLER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REFERENCE TO OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit on which the judgment sought to be reviewed was rendered is reported at 643 F.2d 1229 and 1981-1 CCH Trade Cases ¶63,886.

STATEMENT OF GROUNDS OF JURISDICTION

(i) The judgment sought to be reviewed was entered on March 18, 1981.

(ii) The court below denied rehearing by order dated May 6, 1981.

(iii) N/A

(iv) This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Section 1 of the Sherman Act, as amended (26 Stat 209, 50 Stat 693, 69 Stat 282, 88 Stat 1708, 89 Stat 801), 15 U.S.C. § 1 (1976), provides:

> **§ 1. Trusts, etc., in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act (38 Stat 731), 15 U.S.C. § 15 (1976), provided at the times this action was brought and the appeal below heard:

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 4 of the Clayton Act was amended on September 12, 1980 by Public Law 96-349, § 4(a)(1), 94 Stat 1156, to provide (15 U.S.C. Annot. § 15 (1980-81 pocket supp.)):

§ 15. Suits by persons injured; amount of recovery; prejudgment interest

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

STATEMENT OF THE CASE

A. Basis for federal jurisdiction alleged in the court of first instance:

The complaint alleged that the District Court had jurisdiction over the asserted antitrust claim under 28 U.S.C. § 1337 and Section 4 of the Clayton Act (15 U.S.C. § 15) "to redress injuries sustained by the plaintiff [Chrysler] as a result of violations by the defendants . . . of Section 1 of the . . . Sherman Act" (Complaint ¶ 9, CAA 9*). The complaint also alleged that the District Court had jurisdiction over various state law claims based on pendent jurisdiction (Complaint ¶ 11, CAA 9-10).

B. The substantive allegations:

This case arose after Chrysler Corporation ("Chrysler") entered into an agreement (the "Agreement") with Fedders Corporation ("Fedders") to sell virtually all the assets of Chrysler's Airtemp Division. The Airtemp Division was engaged in the business of designing, manufacturing, marketing and servicing non-automotive air conditioning systems. The assets to be acquired by Fedders under the Agreement included the stock of various subsidiaries connected with the Airtemp operation, but excluded two subsidiaries in South Africa and Australia whose business included, among other things, Airtemp business (A1-2**; Agmt. § 1.3(b)(ii), CAA 71).

Chrysler became dissatisfied with the Agreement and alleged in this action that Fedders did not pay it several million dollars due under the Agreement (A2). The "antitrust" count in the complaint charges that defendants conspired to manipulate the non-automotive air conditioning market so as to lessen or eliminate competition (*id.*). This "conspiracy" was allegedly

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* The abbreviation "CAA" refers to pages of the Joint Appendix in the Court of Appeals, which has been requested to be certified and transmitted pursuant to Rules 19.1 and 19.2 of the Rules of this Court.

** The abbreviation "A" refers to pages of the Appendix to this Petition, *infra*.

directed to and accomplished by the acquisition of the Airtemp Division assets for inadequate consideration (*e.g.*, Complaint ¶¶ 26(a), 27(c), 27(1), 27(m), 27(n), 27(o), 28; CAA 14, 17-28).

C. The decisions below:

The District Court granted defendants' motion to dismiss the complaint because of its failure to allege any "antitrust injury", as required by this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (A2).

The Sixth Circuit affirmed most of this result in an opinion which devoted the bulk of its discusion of the injury and standing issue to harmonizing *Brunswick* with its earlier decision in *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975)* (A3-10). The Court of Appeals reversed the District Court in two particulars, holding that: (1) Chrysler has standing to sue for injuries assertedly caused to the South African and Australian corporations, and (2) Chrysler may assert its "antitrust" claim "as a purchaser of air-conditioning equipment" (A10-11).

As we shall show, these holdings are at variance with the law uniformly applied in other circuits, in that:

1. The holding that a person may have standing to sue for injuries assertedly caused directly to corporations in which it owns stock is a 180-degree departure from the law followed by every other court which has considered the issue.

2. Chrysler's so-called "antitrust" claim is legally insufficient, regardless of questions of injury and standing, because it fails to allege a violation of the Sherman Act. The District Court held that it was "questionable", but "assume[d] for the purposes of . . . [its] opinion that . . . [Chrysler] state[d] an antitrust claim, or at least with a little modification perhaps, discovery, amend-

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* The *Malamud* case adopts a very liberal test of standing which is applied only in the Sixth Circuit and which has been criticized by the commentators. *E.g.*, Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U.L. REV. 374, 404-405 (1976); Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U.L. REV. 795, 806-807 (1976); Note, 45 GEO. WASH. U.L. REV. 100, 109 (1976).

ment, could do so" (A21-22). The Court of Appeals' opinion does not discuss the issue, but its result necessarily implies a holding sustaining Chrysler's theory that it is a violation of Section 1 of the Sherman Act to conspire to drive a competitor out of business by agreeing to acquire its assets without paying adequate consideration.* This holding is at odds with the law in other circuits.

ARGUMENT

POINT I

THE SIXTH CIRCUIT'S HOLDING THAT CHRYSLER MAY HAVE STANDING AS A STOCKHOLDER OF OTHER COMPANIES IS CONTRARY TO THE LAW IN OTHER CIRCUITS

Every case which we have located on the issue—including prior decisions of the Sixth Circuit—has held that a person does not have standing to assert a claim that he was injured as a stockholder of a corporation damaged by an antitrust violation. *E.g., Bosse v. Crowell Collier & MacMillan*, 565 F.2d 602, 606-607 (9th Cir. 1977); *Scharmer v. Carrollton Mfg. Co.*, 525 F.2d 95, 100 (6th Cir. 1975); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Bookout v. Schine Chain Theatres, Inc.*, 253 F.2d 292, 294-95 (2d Cir. 1958); *Peter v. Western Newspaper Union*, 200 F.2d 867, 872-73 (5th Cir. 1953); *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d Cir. 1910); *Former Stockholders of Barr Rubber Prods. Co. v. McNeil Corp.*, 325 F. Supp. 917 (N.D. Ohio 1970), *aff'd*, 441 F.2d 1169 (6th Cir. 1971).**

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* This issue was briefed extensively below. Chrysler's Brief 16-32; Fedders Defendants' Brief 49-66; Chrysler's Reply Brief 21-27. These briefs have been requested to be certified and transmitted pursuant to Rules 19.1 and 19.2.

** *See also, Peterson v. Borden Co.*, 50 F.2d 644 (7th Cir. 1931), holding that minority stockholders in a corporation had not alleged an antitrust claim by pleading that the corporation and a competitor had conspired to eliminate competition between them and, as part of the scheme, defrauded the plaintiffs into selling their stock at an unduly low price.

As this Court put in in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972), "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." The Court then cited ten cases.

The Court of Appeals ignored this law and held instead that "[t]he real question regarding this alleged injury is not one of standing, but of *directness*" (A10; emphasis in original). The court did recognize that Chrysler's position as a stockholder may make it "too remote from the violation to maintain an action for these damages" and cited its decision in *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963) (A10-11).* But the court did not discuss the conflict between its holding and the law which uniformly prevails in other circuits. Indeed, the Sixth Circuit did not even seem to recognize that its own prior decisions, including one decided only a few months after the *Malamud* case, *supra*, expressly held that a stockholder may not assert "in his own right" a claim for antitrust injury allegedly sustained by his corporation. *Scharmer v. Carrollton Mfg. Co.*, *supra* at 100, citing *Former Stockholders of Barr Rubber Prods. Co. v. McNeil Corp.*, *supra*.

Consequently, review by this Court is necessary to resolve this conflict between the circuits and to decide an issue which, until the Sixth Circuit's decision in this case, had been regarded as settled in favor of a rule contrary to this latest holding of the Sixth Circuit.

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* The *Volasco* case has frequently been cited as a case which adopts the "direct injury" test for standing; and it was cited in *Hawaii v. Standard Oil Co.*, *supra*, as one of the cases supporting the "virtually unanimous" conclusion that not all injuries conceivably flowing from an antitrust violation are compensable. In *Malamud v. Sinclair Oil Corp.*, *supra* at 1150, the Sixth Circuit held that *Volasco* does not adopt the "direct injury" standard.

POINT II

THE HOLDING OF THE SIXTH CIRCUIT IS ALSO IN CONFLICT WITH THE LAW IN OTHER CIRCUITS THAT THE "CONSPIRACY" ALLEGED IS NOT AN ANTITRUST VIOLATION

The so-called antitrust violation alleged is that defendants, related corporations (CAA 7-9), supposedly conspired "to eliminate or destroy a competitor [Chrysler's Airtemp Division] by . . . unfair means . . . [in violation of] Section 1 of the Sherman Act" (Chrysler's Brief to 6th Cir. at 17). The so-called "unfair means" were Fedders' alleged "failure to fulfill its obligations under the contract" for the acquisition of Airtemp assets (A 9). Chrysler conceded below (Chrysler's Brief 17-18) that it found the legal basis for asserting that a conspiracy to eliminate a competitor by "unfair means" is an antitrust violation in the decisions in *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932); *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 368 U.S. 945 (1966); and *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960). Chrysler even argued that *Pick-Barth* is "the seminal case" (Chrysler's Brief 28; Chrysler's Reply Brief 4).

When those cases were decided they added a new and unsettling dimension to what had traditionally been regarded as *per se* violations. *See, e.g., Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958). However, more recent decisions in the circuits which decided those much-criticized cases have retreated from the view that a conspiracy to drive a competitor out of business is a *per se* violation of the Sherman Act. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 560-62 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Craig v. Sun Oil Co.*, 515 F.2d 221, 223-24 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976).

Courts in other circuits and later cases in the same circuits have uniformly rejected the approach of the cases Chrysler relied on. *E.g., Juneau Square Corp. v. First Wisconsin Nat'l Bank*, 624 F.2d 798, 810-13 (7th Cir. 1980); *Larry R. George*

Sales Co. v. Cool Attic Corp., 587 F.2d 266, 272-74 (5th Cir. 1979); *Northwest Power Prods., Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 86-90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Sitkin Smelting & Ref. Co. v. FMC Corp.*, 575 F.2d 440, 446-48 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978); *Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc.*, 594 F.2d 114 (5th Cir. 1979); *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc.*, 578 F.2d 1256 (8th Cir. 1978); *A.D.M. Corp. v. Sigma Instruments, Inc.*, 481 F. Supp. 1297, 1299-1300 (D. Mass.), *aff'd*, 628 F.2d 753 (1st Cir. 1980); *Hsing Chow v. Union Central Life Ins. Co.*, 457 F. Supp. 1303 (E.D.N.Y. 1978); *Particle Data Laboratories, Ltd. v. Jackson*, 1978-2 Trade Cases ¶62,308 (N.D. Ill. 1978); *General Communications Engineering, Inc. v. Motorola Communications & Electronics, Inc.*, 421 F. Supp. 274, 288-290 (N.D. Cal. 1976); *Mar Food Corp. v. Doane*, 405 F. Supp. 730 (N.D. Ill. 1975).

This Court has also recently enunciated a policy against extension of *per se* violations of the antitrust laws beyond the traditional list of such violations. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *accord, e.g., Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 570 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).*

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* Chrysler cannot validly assert that the complaint is sustainable as alleging a rule of reason violation, because, as the District Court concluded (A21-22), it does not allege facts showing public injury. That is the legal requirement for alleging a claim based on the rule of reason. *E.g., Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500-501 (1940); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 699-700 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506, 517-18 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); *Hohensee v. Akron Beacon Journal Pub. Co.*, 277 F.2d 359 (6th Cir. 1960), *cert. denied*, 364 U.S. 914 (1960), *aff'g*, 171 F. Supp. 90 (N.D. Ohio 1959); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F.2d 891, 894 (5th Cir. 1954); *Feddersen Motors, Inc. v. Ward*, 180 F.2d 519, 522 (10th Cir. 1950); *Shotkin v. General Electric Co.*, 171 F.2d 236, 239 (10th Cir. 1948); *Van Dyke Ford, Inc. v. Ford Motor Co.*, 399 F. Supp. 277, 281 (E.D. Wis. 1975); *Oak Distributing Co. v. Miller Brewing Co.*, 370 F. Supp. 889, 899 (E.D. Mich. 1973); *duPont Walston, Inc. v. E.F. Hutton & Co.*, 368 F. Supp. 306, 309-10 (S.D. Fla. 1973); *L.S. Good & Co. v. H. Daroff & Sons, Inc.*, 279 F. Supp. 925, 927 (N.D. W. Va. 1968); *Epstein v. Dennison Mfg. Co.*, 1966 Trade Cases ¶71,852 (S.D.N.Y. 1966); *Tobman v. Cottage Woodcraft Shop*, 194 F. Supp. 83, 87-88 (S.D. Cal. 1961); *Northern California Monument Dealers Ass'n v. Interment Ass'n*, 120 F. Supp. 93, 95 (D. Cal. 1954).

Thus, the decision of the Sixth Circuit represents the adoption of what may once have been a minority view in the circuits, but which has now been rejected by every other circuit and which appears contrary to this Court's admonition in the *Continental T.V.* case, *supra*. Consequently, certiorari should be granted to lay this issue to rest once and for all.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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WEISMAN, CELLER, SPETT,
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APPENDIX

APPENDIX

OPINION DELIVERED UPON THE RENDERING OF THE JUDGMENT BY THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED

No. 78-1287

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHRYSLER CORPORATION,
Plaintiff-Appellant,

v.

FEDDERS CORPORATION, FEDDERS INTERNATIONAL CORPORATION, AIRTEMP CORPORATION, AIRTEMP INTERNATIONAL CORPORATION, FEDDERS WORLD TRADE CORPORATION and INTERCLISA, S.A.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 18, 1981

Before: EDWARDS, Chief Judge; MARTIN, Circuit Judge; and PHILLIPS, Senior Circuit Judge.

MARTIN, Circuit Judge. Chrysler Corporation appeals the dismissal of its complaint charging Fedders Corporation and others with violations of the antitrust laws. The case arose after Chrysler entered into an agreement with Fedders to sell virtually all the assets of Chrysler's Airtemp Division. The Airtemp Division was engaged in the business of designing, manufacturing, marketing, and servicing non-automotive air-conditioning systems. The assets acquired by Fedders included the stock of various subsidiaries connected with the Airtemp operation, but excluded two subsidiaries in Aus-

tralia and South Africa. Chrysler also covenanted, with certain exceptions, not to compete in the non-automotive air-conditioning market for a period of five years.

After the contract was executed, Chrysler became dissatisfied with the agreement. According to the complaint filed below, Fedders has never paid Chrysler several million dollars due under the contract.

On November 14, 1977, Chrysler brought this action under § 4 of the Clayton Act, 15 U.S.C. § 15, alleging that the defendants had violated § 1 of the Sherman Act, 15 U.S.C. § 1. The complaint charged the defendants with conspiring to manipulate the non-automotive air-conditioning market in a manner calculated to lessen and eliminate competition. In addition to the antitrust claim, Chrysler alleged twenty-two pendant claims for relief under state law.

On February 10, 1978, all the defendants except Interclisa moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the antitrust claim on the grounds that it failed to state a cause of action and that Chrysler lacked standing to sue under § 4 of the Clayton Act. They also moved under Rule 12(b)(1) to dismiss the other claims for lack of diversity.

On February 24, 1978, the District Court granted the motion to dismiss the antitrust claim. It specifically found that Chrysler met the standing requirements articulated by this Court in *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975), but went on to hold that *Malamud* is "wrong" in light of the Supreme Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). The District Court characterized Chrysler's claim as a breach of contract action which lacked the element of "antitrust injury" required by *Brunswick*. Because this essential element was missing, the court held that Chrysler did not have standing to sue under § 4 of the Clayton Act.

On March 10, 1978, defendant Interclisa, a Spanish corporation, filed a Rule 12(b)(2) and 12(b)(6) motion to dismiss the complaint against it. Interclisa alleged, in addition to the arguments advanced by the Fedders defendants, that the court lacked *in personam* jurisdiction over Interclisa. The District Court agreed and granted the motion, holding that Interclisa had insufficient contacts with the forum to support jurisdiction under either the Michigan long arm statute, M.C.L.A. § 600.-715(2), or § 12 of the Clayton Act, 15 U.S.C. § 22. The court also denied Chrysler's request for further discovery on the question of Interclisa's forum contacts.

On appeal, Chrysler contends that it succeeded in making out a cause of action under § 1 of the Sherman Act and that it satisfies this circuit's requirements for standing to sue under § 4 of the Clayton Act. It argues that our opinion in *Malamud* is unaffected by the Supreme Court's *Brunswick* decision and that, in any event, its complaint alleges "antitrust injury." Chrysler also claims that the District Court erred in dismissing the complaint against Interclisa on jurisdictional grounds and in refusing to allow Chrysler to conduct further discovery of jurisdictional facts.

We hold that *Brunswick* does not negate our decision in *Malamud*. Rather, the effect is cumulative; *Brunswick* merely adds to the standing requirements set out in *Malamud*. Insofar as Chrysler claims that the defendants eliminated it as a competitor in the non-automotive air-conditioning market, the District Court correctly concluded that Chrysler failed to allege "antitrust injury" and therefore lacked standing under § 4 of the Clayton Act. However, certain of Chrysler's other allegations do satisfy this circuit's post-*Brunswick* standing test and should not have been dismissed.

Finally, we affirm the District Court's finding that it lacked personal jurisdiction over Interclisa and uphold its exercise of discretion in denying Chrysler's request for further discovery.

I. Chrysler's Standing Under § 4 of the Clayton Act

In *Malamud, supra,* this Court addressed the troublesome question of standing to sue under § 4 of the Clayton Act. The plaintiffs in that case fell into three categories: 1) the individuals Jack and Ann Malamud, who were also the officers, directors, and sole shareholders of the corporate plaintiffs; 2) Malco Petroleum, a petroleum distributing corporation; and 3) three real estate investment corporations.

In 1965, Malco and Sinclair Oil executed a distribution agreement. The parties had an understanding that Sinclair would provide financial assistance to the Malamuds' investment companies in their efforts to acquire and develop new service station properties. In early 1966, however, Sinclair declined to help finance several proposed real estate ventures, whereupon Malco unsuccessfully sought an early termination of the contract. After the contract expired, the plaintiffs filed suit, alleging that Sinclair's failure to provide financing and refusal to permit an early contract termination violated § 1 of the Sherman Act and § 3 of the Clayton Act.

Sinclair sought and was denied summary judgment. On a motion for reconsideration, it argued that all of the plaintiffs lacked standing because none of them had been "directly" injured. The District Court rejected this contention and held that all the plaintiffs had standing as defined in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970). However, it went on to find that neither the individual plaintiffs nor Malco could possibly satisfy the further requirement that their injury bear a "direct" and causal relationship to the alleged antitrust violations. As for the investment company plaintiffs, however, a determination of the "directness" of their injury presented mixed questions of law and fact. Accordingly, the District Court denied summary judgment against the investment firms. It subsequently certified for appeal the threshold question of their standing to sue.

We affirmed the lower court's finding that the investment companies had standing but rejected its application of the "direct injury" test as a means of limiting standing under § 4. 521 F.2d at 1149. The concept of "direct injury," derived from *Loeb* v. *Eastman Kodak*, 183 F. 704 (3rd Cir. 1910), focuses on the relationship between the plaintiff and the defendant. If the alleged injury is "remote," such as that of a stockholder or creditor of a corporation injured by the defendant, standing is denied. *Loeb, supra; Gerli* v. *Silk Association of America*, 36 F.2d 959, 960 (S.D.N.Y. 1919). We also rejected the "target area" test, another means of circumscribing standing under § 4. That standard requires the plaintiff to be within the area of the economy allegedly injured by the defendant, *In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *In Re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), and has spawned numerous and often inconsistent opinions attempting to delineate its scope. *See* Berger and Bernstein, *An Analystical Framework for Antitrust Standing*, 86 Yale L.J. 809, 830 (1977).

The two approaches to standing described above purport to derive from the causative language in § 4 itself, i.e., absent a showing that the plaintiff suffered "direct injury" or was within the "target area," no injury "by reason of anything forbidden in the antitrust laws" is deemed to have occurred. Our refusal to apply either theory was based on the belief that both demand too much from a plaintiff at the pleading stage of his case. In effect, they require a court "to make a determination on the *merits* of a *claim* under the guise of assessing the *standing* of the *claimant*." 521 F.2d at 1150. (emphasis in original).

We decided in *Malamud* that the appropriate test for standing in an antitrust action is the one articulated by the Supreme Court in *Association of Data Processing Service Organizations* v. *Camp, supra*, a case involving standing under the Bank

Service Corporation Act of 1962, 12 U.S.C. § 1864. That standard requires (1) an allegation that the defendant caused the plaintiff injury in fact, and (2) that the interest which the plaintiff seeks to protect is arguably within the zone of interests protected by the relevant antitrust laws. 521 F.2d at 1151. In essence, we repudiated any "proximate cause" limitations on antitrust standing in favor of the less stringent requirement that the plaintiff be protected by the substantive antitrust law. *See* Berger and Bernstein, *supra*, at 838-39.

Two years after Malamud, the Supreme Court decided the *Brunswick* case. There, the plaintiffs sought treble damages against the Brunswick Corporation, one of the two largest manufacturers of bowling equipment in the United States. During the retail bowling boom in the 1950's, the majority of Brunswick's sales were on extended credit terms. The early 1960's brought a sharp decline in the industry, and Brunswick encountered great difficulty in collecting the debts created by the earlier expansion. Brunswick began repossessing the equipment and, where possible, reselling it in place to third parties. Where resale was impossible, Brunswick acquired and operated certain defaulting retail centers. The plaintiffs were retail bowling centers in competition with the acquired centers in three markets. They alleged that Brunswick's acquisitions in those markets violated § 7 under the "deep pocket" theory of *Reynolds Metal Co.* v. *F.T.C.*, 309 F.2d 223 (D.C. Cir. 1962), and *F.T.C.* v. *Proctor and Gamble Co.*, 386 U.S. 568 (1967). The plaintiffs argued that but for Brunswick's acquisitions the acquired centers would have gone out of business, and the plaintiffs would have gained customers and realized increased profits. Thus, they concluded, they were injured in their business by reason of Brunswick's § 7 violation and were, therefore, entitled to treble damages under § 4.

The Supreme Court rejected this theory of recovery, holding that §4 requires a plaintiff to prove more than just a § 7 violation and a causal link between that violation and the alleged

injury. 429 U.S. at 489. The Court noted that the plaintiffs' real complaint was that Brunswick's acquisition of the bowling centers preserved competition, thereby depriving the plaintiffs of the increased profits which would have resulted from the reduction of competition. The Court stated:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. at 125.

Id. (footnote omitted). Since the plaintiffs offered no alternative theory to support their damage award, the Court directed that a judgment notwithstanding the verdict be entered in favor of Brunswick. *Id.* at 490.

We disagree with Chrysler's suggestion that the holding in *Brunswick* is limited to treble damage actions for violations of § 7 of the Clayton Act. Although that decision was an "intermeshing" of § 7's prohibitions with the § 4 remedy, 429 U.S. at 486, it primarily addresses the boundaries of the treble damage section. The Supreme Court was concerned with bringing antitrust recovery in line with the purposes of the antitrust laws. *Id.* at 487. We see no reason why its holding should not be applicable where, as here, the statutory prohibition upon which a treble damage action is based is found in the Sherman Act.

We also disagree with Chrysler's assertion that nothing in *Brunswick* mandates any change in the *Malamud* standing tests. Although the Supreme Court did not explicitly describe the issue in *Brunswick* as one of standing, that decision clearly establishes that a plaintiff must plead an injury of the type § 4 was intended to remedy before his case will be heard.

That *Brunswick* involved a controversy which had already been tried in the District Court does not, as Chrysler argues, limit its relevance to the *causation* of antitrust damage. If the failure to prove cognizable damages requires a judgment for the defendant notwithstanding the verdict, 429 U.S. at 491, it follows that a failure to allege cognizable damages compels the dismissal of the complaint.

Thus, we interpret *Brunswick* to mean that the pleading of "antitrust injury" is an essential component of standing under § 4 of the Clayton Act.[1] Other courts have reached a similar conclusion. *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977); *Hardwick* v. *Nu-Way Oil Co.*, 443 F.Supp. 940 (S.D.Tex. 1978); *aff'd*, 589 F.2d 806, *cert. denied*, 444 U.S. 836 (1979); *Juneau Square Corp.* v. *First Wisconsin National Bank*, 445 F.Supp. 965 (E.D.Wis. 1978); *L&H Investments, Ltd.* v. *Belvey Corp.*, 444 F.Supp. 1321 (W.D.N.C. 1978).

As we have already observed, *Brunswick* merely adds to the *Malamud* standing requirements; it does not, as the District Court suggests, prove *Malamud* "wrong." *Brunswick* in no way alters our rejection of the "direct injury" and "target area" approaches to antitrust standing. Indeed, we reiterate here our admonition against making a determination on the merits under the guise of assessing the standing of the claimant. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968).

In order to establish standing in an antitrust action, this

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[1] *But see Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979), which treats antitrust injury and standing as related but analytically distinct aspects of the "problem of determining when a person is sufficiently 'injured in his business or property by reason of anything forbidden in the antitrust laws.'" *Id.* at 582. *See also* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 Col. L. Rev. 979, 994-97 (1977).

circuit continues to require (1) that the plaintiff allege injury in fact and (2) that the interest which the plaintiff seeks to protect is arguably within the zone of interests protected by the statute in question. *Brunswick* adds to that standard the requirement that the plaintiff allege *antitrust* injury when seeking treble damages under § 4 of the Clayton Act. Unlike the "direct injury" and "target area" tests, *Brunswick* does not inject an element of proximate cause into the standing inquiry; rather, it compels the court to focus on the *type* of injury pleaded and its relationship to the alleged anticompetitive conduct.

In the present case, Chrysler's primary allegation is that it has been eliminated from competition with the defendants by the virtual destruction of the Airtemp Division and its affiliated foreign subsidiaries. Chrysler contends that Fedders' failure to fulfill its obligations under the contract gave the Fedders defendants the financial power to effect this destruction. Chrysler does not suggest that the contract itself violates the antitrust laws; rather, it claims that Fedders' subversion of that agreement was the anticompetitive means of eliminating Chrysler from the market.

We hold that these alleged injuries do not constitute "antitrust injury" within the meaning of *Brunswick, supra.* By contracting to sell virtually all the assets of the Airtemp Division and all but two of its foreign subsidiaries, Chrysler voluntarily withdrew from competition in the non-automotive air-conditioning market. It did not contemplate continuing to compete in that market and in fact covenanted not to do so except through the Australian and South African subsidiaries.

Even if a breakdown of competitive conditions in the market has indeed occurred, Chrysler's loss is not attributable to that change. Chrysler would have suffered an identical loss if the defendants had failed to make payments under the contract for reasons unrelated to the alleged antitrust violations. *Cf.*

Brunswick, supra, at 487. Moreover, if the defendants had fulfilled their obligations as agreed, Chrysler would have no complaint, yet would still be divested of its assets and precluded from competing in the market. *See A.D.M. Corp.* v. *Sigma Instruments, Inc.*, 628 F.2d 753 (1st Cir. 1980). Therefore, to the extent that Chrysler alleges damages resulting from its elimination from competition with the defendants through the Airtemp Division and the subsidiaries included in the contract for sale, it lacks the "essential connection between injury and the aims of the antitrust laws" necessary to establish standing. *A.D.M. Corp., supra,* at 754.

However, Chrysler does not lack standing to pursue all of the allegations in its complaint. The claim that it has been injured as a purchaser of air-conditioning equipment by the defendants' anticompetitive acts is clearly an allegation of "antitrust injury." *See Chattanooga Foundry & Pipe Works* v. *Atlanta,* 203 U.S. 390 (1906). Chrysler also satisfies both requirements of the standing test set out in *Malamud.* That claim cannot be dismissed on the pleadings; on remand, Chrysler must be given an opportunity to support its allegation with proof.

Chrysler's contention that it has been injured by the destruction of Chrysler South African and Chrysler Australia, the two subsidiaries excluded from the agreement, is also an allegation of "antitrust injury." As a shareholder of those subsidiaries, Chrysler has pleaded injury which reflects the anticompetitive nature of the challenged conduct. This claim satisfies *Malamud*'s requirements as well; it alleges injury in fact, and Chrysler's interest as the parent of a subsidiary destroyed by a § 1 violation is arguably within the zone of interests protected by the antitrust laws. The real question regarding this alleged injury is not one of standing, but of *directness.* When we rejected the "direct injury" approach to standing in *Malamud,* we explicitly characterized the issue of "directness" as "one that must be resolved upon some factual showing." 521 F.2d at 1150. Though the District Court may

conclude that Chrysler is too remote from the violation to maintain an action for these damages, *see Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963), it may not dismiss the claim on the theory that Chrysler lacks standing to assert it. Such a result would contravene the liberal standing requirements adopted by this circuit in *Malamud*.

II. Jurisdiction Over Interclisa

Chrysler asserts that the District Court had personal jurisdiction over Interclisa under the Michigan long arm statute, M.C.L.A. § 600.715(2), and under § 12 of the Clayton Act, 15 U.S.C. § 22.

A. Jurisdiction under the long arm statute.

The Michigan long arm statute, available to Chrysler pursuant to Rule 4(e) of the Federal Rules of Civil Procedure, provides for limited *in personam* jurisdiction over a corporation whose relationship with the state arises from "[t]he doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort." Chrysler's antitrust claim is a form of tort action. *See Weinstein* v. *Norman M. Morris Corp.*, 432 F.Supp. 337 (E.D.Mich. 1977).

The Michigan statute confers on the state courts the maximum scope of personal jurisdiction permitted by the due process clause of the Fourteenth Amendment. *Microelectric Systems Corp.* v. *Bamberger's*, 434 F.Supp. 168 (E.D.Mich. 1977). Due process requires that defendants have such minimum contracts with the forum state that maintenance of an action would not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

The only contacts which Chrysler asserts that Interclisa has had with the State of Michigan are the acts of Interclisa's codefendants. Chrysler alleges that Interclisa conspired to

violate the antitrust laws and that "critical acts" in furtherance of the conspiracy were performed in Michigan by Interclisa's coconspirators. Chrysler claims that those acts and their consequences are attributable to Interclisa for the purpose of establishing the minimum contacts necessary to the court's exercise of personal jurisdiction.

This court has not addressed the question of whether the acts of a coconspirator, performed in the forum state in furtherance of the conspiracy, constitute sufficient minimum contacts to establish personal jurisdiction over an absent coconspirator who has no other contact with the forum. The leading case on this "conspiracy theory" of jurisdiction is *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 319 F.Supp. 1256 (S.D.N.Y. 1970), a securities fraud action under the Securities Exchange Act of 1934. There, one of the defendants, an English solicitor, challenged the District Court's jurisdiction over him under the New York long arm statute. He argued that allegations of his participation in a conspiracy which acted in New York through another defendant were, without more, insufficient to support jurisdiction. In holding that it did not have personal jurisdiction over the alien defendant,[2] the court stated that "mere allegations of conspiracy and even the presence of one co-conspirator within the jurisdiction do not give jurisdiction over all the alleged coconspirators." 319 F.Supp. at 1261. It added that the plaintiff's allegations of conspiracy were totally unsupported and were denied by the alien defendant by affidavit. The court noted that "[t]o meet due process requirements there must be a factual showing of conspiracy and also of a connection between the acts of the conspirator who was present in the jurisdiction and the conspirator who was absent." *Id.*

The *Leasco* approach has been adopted in several jurisdictions where the question has arisen. *See, e.g., McLaughlin* v.

[2] This aspect of the court's decision was vacated on appeal to permit further discovery as to jurisdictional facts. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326 (1972). See p. 20 *infra*.

Copeland, 435 F.Supp. 513 (D.Md. 1977); *Chromium Industries* v. *Mirror Polishing and Plating Co.*, 448 F.Supp. 544 (N. D.Ill. 1978). Other courts have rejected the coconspirator theory as an impermissible means of enlarging the "transacting business" test of § 12 of the Clayton Act. *See Weinstein* v. *Norman M. Morris Corp., supra; West Virginia* v. *Morton International, Inc.*, 264 F.Supp. 689 (D.Minn. 1967); *I. S. Joseph Co., Inc.* v. *Mannesmann Pipe and Steel Corp.*, 408 F.Supp. 1023 (D. Minn. 1976).

The *Leasco* requirement that a plaintiff make a factual showing of conspiracy has been criticized because of the difficulties of pleading and proving conspiracy. Thus, in *Mandelkorn* v. *Patrick*, 359 F.Supp. 692 (D.D.C. 1973), the court exercised personal jurisdiction over the non-resident defendants as a result of their alleged participation in a conspiracy to violate 42 U.S.C. §§ 1983 and 1985, despite the plaintiffs' failure to make a factual showing of conspiracy. However, the *Mandelkorn* court found it significant that the defendants had denied neither the existence of nor their participation in the alleged conspiracy. It specifically noted that the situation would have been quite different if the defendants had denied the allegations. 359 F.Supp. at 396-97. *See also Centronics Data Computer Corp.* v. *Mannesmann, A.G.*, 432 F.Supp. 659 (D.N.H. 1977).

In the present case, Chrysler's allegation of a conspiracy including Interclisa and the Fedders defendants is unsupported by any factual assertions. In support of its motion to dismiss, Interclisa filed two affidavits of its managing director, Alfredo Calzada Atienza. Those affidavits state, in pertinent part, that Interclisa was not involved in the contract negotiations between Chrysler and Fedders and had no knowledge of or connection with any conspiracy. Chrysler did not submit counter-affidavits and, as the trial court pointed out, offered no reason to doubt any of the statements in Mr. Calzada's affidavits. Under these circumstances we hold that Chrysler's totally unsupported allegations of conspiracy cannot constitute

sufficient contacts with Michigan to justify an exercise of personal jurisdiction over Interclisa by the District Court.

Similarly, the allegation of conspiratorial activities with tortious consequences in the forum state is insufficient to support jurisdiction under the long arm statute in the absence of some minimal factual showing of Interclisa's participation in the conspiracy. *Cf. Weinstein, supra,* 432 F.Supp. at 345.

In light of our holding on this issue, we need neither adopt nor reject the "conspiracy theory" of *in personam* jurisdiction as a general principle of law in this circuit.

B. Jurisdiction under § 12 of the Clayton Act.

Chrysler advances a second basis for its assertion that Interclisa is subject to the personal jurisdiction of the District Court. According to Chrysler's theory, jurisdiction over a foreign corporation being sued on a federal cause of action may be founded on the corporation's contacts with the United States as a whole as opposed to its contacts with the forum state.[3]

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[3] Of course, Congress or the Supreme Court may impose restrictions on the *in personam* power of federal courts. These restrictions may be found in venue statutes, the Federal Rules of Civil Procedure, and in the federal statutes under which the plaintiff brings his action. In this case, Chrysler claims that venue is proper under 28 U.S.C. § 1391(d), which provides that an alien may be sued in any district. It further asserts that service of process is authorized by the second clause of § 12 of the Clayton Act, notwithstanding Chrysler's inability to satisfy the venue provisions in the first clause of that section.

Section 12 provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Interclisa, on the other hand, argues in its brief that the service of process provision in the second clause of § 12 is available only when the forum contact requirements of the first clause are met. We need not decide this question because, as Chrysler points out, Interclisa's failure to object to service of process or venue in its Rule 12(b) motion below constitutes a waiver of any such objection here. Federal Rules of Civil Procedure, Rule 12(h).

However, the existence of proper venue is not enough, in itself, for *in personam* jurisdiction to result from extra-territorial service of

This "national contacts" or "aggregate contacts" concept is based on the proposition that a court's jurisdictional power to render a binding judgment on federal questions must be examined in light of the due process clause of the Fifth rather than the Fourteenth Amendment. *Edward J. Moriarty & Co.* v. *General Tire and Rubber Co.*, 289 F.Supp. 381 (S.D.Ohio 1967). Although the "minimum contacts" test developed in the *International Shoe* line of cases deals with Fourteenth Amendment due process restrictions on the states, the rationale of those cases applies equally to the Fifth Amendment, since the sovereign powers of the United States are at least as broad as those of the states. *Amburn* v. *Harold Forster Industries, Ltd.*, 423 F.Supp. 1302, 1304 (E.D.Mich. 1976). The court in *Moriarty, supra*, described the appropriate application of the minimum contacts test to state and federal governments:

> Thus, in our view, the judicial jurisdiction over the person of the defendant does not relate to the geographical power of the particular court which is hearing the controversy, but to the power of the unit of government of which that court is a part. The limitations of the concept of personal jurisdiction are a consequence of territorial limitations on the power of the respective forums. Thus, as applied to the states, the constitutional test for personal jurisdiction involves a determination as to whether the defendant has certain minimal contacts *with the forum state*, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).
>
> By the same token, we feel that the appropriate inquiry to be made in a federal court where the suit is based upon

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process. *Mariash* v. *Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974). In order to obtain personal jurisdiction, the plaintiff has the burden of establishing that the defendant has had such minimal contacts with the forum that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe, supra.*

a federally created right is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the Fifth Amendment. For a thorough discussion of this theory, see Green, "Federal Jurisdiction in Personam of Corporations and Due Process," 14 Vanderbilt L.Rev. 967 (1961); Note, "Jurisdiction of Federal District Courts over Foreign Corporations," 69 Harv.L.Rev. 508 (1956). Also see, Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2 Cir. 1960); Gkiafis v. Steamship Yiosonas, 342 F.2d 546 (4 Cir. 1965); Mutual International Export Co. v. Napco, 212 F.2d 147 (5 Cir. 1954); Goldberg v. Mutual Readers League, Inc., 195 F.Supp. 778 (E.D.Pa. 1961); Bar's Leaks Western v. Pollock, 148 F.Supp. 710 (N.D. Cal. 1957); Singleton v. Atlantic Coast Line R. R. Co., 20 F.R.D. 15 (E.D.Mich. 1956).

It may well be neither unfair nor unreasonable as a matter of due process to aggregate the nonforum contacts of an alien corporate defendant in order to establish personal jurisdiction. In *Engineered Sports Products* v. *Brunswick Corp.*, 362 F. Supp. 722 (D.Ntah 1973), the court observed: "Due Process or traditional notions of fair play and substantial justice should not immunize an alien defendant from suit in the United States simply because each state makes up only a fraction of the substantial nationwide market for the offending product." *Id.* at 728. Otherwise, a foreign corporation "could commit serious torts or contract breaches without ever having enough contacts with any one forum to give those injured an opportunity to seek redress." *Centronics Data Computer Corp.* v. *Mannesmann, A.G., supra,* 432 F.Supp. at 664. Thus, although the theory has not yet been generally accepted, and there is no specific statutory authority for it, *see* 4 Wright & Miller, *Federal Practice and Procedure*: Civil § 1075 at 304, n.29 (1976), it has been adopted by several courts. *See Holt* v. *Klosters Rederi A/S*, 355 F.Supp. 354 (W.D.Mich. 1973); *Cryomedics, Inc.* v. *Spembly, Ltd.*, 397 F.Supp. 287 (D.Conn.

1975); *Centronics, supra; Amburn, supra. See also Wells Fargo and Co.* v. *Wells Fargo Express Company*, 556 F.2d 406 (9th Cir. 1977) (aggregating contacts may be proper when a federal statute such as § 12 of the Clayton Act authorizes worldwide service of process); *Moriarty, supra* (decided on other grounds).

The present case, however, does not require us to decide whether the "aggregate contacts" theory is consistent with the due process clause of the Fifth Amendment. Even if we were to hold that nonforum contacts can properly support personal jurisdiction over an alien defendant in antitrust actions, Chrysler has failed to establish that Interclisa has sufficient contacts with the United States as a whole.

The test for determining the sufficiency of the nexus between the forum and the defendant was formulated by the Supreme Court in *Hanson* v. *Denkla*, 357 U.S. 235 (1958):

> The application of [the] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* at 253.

The uncontroverted affidavits submitted by Interclisa in support of its motion to dismiss establish that Interclisa has never: qualified to do business anywhere in the United States; maintained an office or warehouse, or owned or leased any real or personal property in the United States; sold any of its products in or for distribution in the United States; hired any employees or representatives in the United States; or borrowed any money in the United States.

Chrysler contends that Interclisa's purchases of American parts for its air-conditioning products and its use of technology originating in the United States constitute sufficient

contacts for jurisdictional purposes.[4] We hold that these allegations are insufficient to support the exercise of personal jurisdiction. Interclisa's alleged purchases are unrelated to the events giving rise to this litigation. Moreover, there is no indication of how many, if any, purchases were actually made, or whether such purchases represent a substantial portion of Interclisa's parts supply. *Compare Crusader Marine Corp.* v. *Chrysler Corp.*, 281 F.Supp. 802 (E.D. Mich. 1968) with *Eastern Pre-Cast Corp.* v. *Giant Portland Cement Co.*, 311 F.Supp. 896 (E.D.Pa. 1970). Under these circumstances we must conclude that Interclisa lacks sufficient minimum contacts with the United States, and that maintenance of this action against it would offend "traditional notions of fair play and substantial justice." *International Shoe, supra.*

Finally, Chrysler asserts that it should at least have been permitted to conduct discovery concerning jurisdictional facts, and that the District Court's refusal to do so was error.

We agree that discovery may be appropriate when a defendant moves to dismiss for lack of jurisdiction. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972). However, it is well established that the scope of discovery is within the sound discretion of the trial court. *See, e.g., H. K. Porter Co., Inc.* v. *Goodyear Tire and Rubber Co.*, 536 F.2d 1115 (6th Cir. 1976). A ruling by the trial court limiting or denying discovery will not be cause for reversal unless an abuse of discretion is shown. Federal Rule of Civil Procedure 26(b); *H. L. Moore Drug Exch., Inc.* v. *Smith, Kline and French Laboratories*, 384 F.2d 97 (2d Cir. 1967).

Inasmuch as Chrysler failed to offer any factual basis for its allegations of conspiracy, it was well within the trial court's discretion to deny Chrysler's request for discovery. We reach

[4] Chrysler further alleges that Interclisa's denials are "pregnant with admissions" of other contacts such as product sales within the United States. We decline to draw such inferences and note that the first Calzada affidavit explicitly denies that Interclisa has sold any of its products in or for distribution in the United States.

the same conclusion with respect to Chrysler's allegation that Interclisa made purchases in the United States. The District Court expressly found that there is no reasonable basis to expect that further discovery would reveal contacts sufficient to support personal jurisdiction. *See Budde* v. *Ling-Tempco-Vought, Inc.*, 511 F.2d 1033, 1035 (10th Cir. 1975). Although it may have been advisable for the District Court to grant Chrysler's request to conduct discovery, we cannot say that its refusal to do so was an abuse of discretion.

Accordingly, the judgment of the District Court is affirmed in part and reversed in part. The case is remanded for proceedings consistent with this opinion.

DECISION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHRYSLER CORPORATION,

Plaintiff,

v.

FEDDERS CORPORATION, et al.,

Defendants.

Judge James P. Churchill (P-11882)

Civil Action No. 77-2703

EXCERPTS FROM TRANSCRIPT
OF FEBRUARY 24, 1978

THE COURT: I realize this is such an extremely important law suit to you people; it's simply important not because who you people are but I suppose the way we measure importance in this country sometimes is because of the amount of money involved. I can't think of another suit

anywhere from 90 to three or four hundred million dollars as not being an important lawsuit that requires careful consideration.

That would be a factor which would mitigate in favor of my taking this under advisement. I don't feel, frankly, that I could take it under advisement and write anything that would add to the literature of the subject or that would change the happiness or sadness or goodness or badness of the decision.

I don't think there is any question — first thing, on this issue of whether or not they state a claim. It's a near thing. It may have happened but I'm not concerned with the facts here I am concerned with the allegations. Whether or not there is any logic at all in exposing yourself to a breach of contract suit of $100 million in order to put one competitor out of business without any allegations concerning a

monopolistic effect or the amount of the market, or anything of this kind, is questionable, but I am going to assume for the purposes of my opinion that you do state an antitrust claim, or at least with a little modification perhaps, discovery, amendment, could do so.

I also am quite thoroughly satisfied that if this Court applies the test as set forth in the Sixth Circuit and, of course, this is the Sixth Circuit and I am bound by the Sixth Circuit in the Malamud case, that Chrysler had a claim, a valid claim and there is jurisdiction to hear it and standing and all that.

I don't buy the defendant's argument that some way or other Malamud and Brunswick, if Brunswick is applicable, can be reconciled, that is, if it's applicable to a suit under this section. But I just can not read Brunswick in any way except for the fact that Malamud is wrong.

It's as simple as that. This is not an antitrust injury; no amount of language, no amount of words, no amount of words could twist it around that way. It's absolutely unsound, almost spurious argument as far as I am concerned the idea that someway or other a non-payment of a contract by a competitor who sells it creates an antitrust injury.

It's just--no matter how you analyze it you come back to the same conclusion and this language in Brunswick I am satisfied applies to cases of this kind generally.

This language in Brunswick, I am satisfied applies to cases of this kind generally:

> "Plaintiffs must prove antitrust injury which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which

makes the defendant's act unlawful. The injury should reflect the anti-competitive effect either of the violation or anti-competitive act made possible by the violation."

We are talking about the antitrust laws in this situation and we are talking about the Congressional intent.

In the final analysis these few words that have created so many millions of words of print really comes back down to what does Congress intend. This is a matter of national policy expressed by Congress and interpreted by the United States Supreme Court. The United States Supreme Court says this has gone far enough, let's have a rule it must be an antitrust injury in order to collect treble damages and, therefore, that being my understanding of the law I am satisfied the Sixth Circuit would not

do the same thing again, at least they wouldn't use the same language that notwithstanding the Malamud--or however it's pronounced--case--that it is the law of this circuit as well as the entire United States, that this complaint does not state a claim for damages under the Section 4, or under the entire, any section of the antitrust law.

Now where does that leave us? Right now on the basis of this complaint, notwithstanding Chrysler's assertion to the contrary we do not have complete diversity. It has been my understanding that we don't look to claims we look to parties. That isn't quite the same thing as saying that in an appropriate case a court when it doesn't have diversity can't allow —I'm not saying it can either, but I'm not saying it can not allow claims to be dropped and the law suit to be altered to acquire jurisdiction.

This was a rush law suit. It was rush because both parties wanted it rush in their own way. You each rushed this. I really don't think Chrysler has had a chance to address themselves to this issue very fairly. I think they misstated something when they stated they pleaded diversity jurisdiction. They didn't. They pleaded an antitrust law suit with pendent jurisdiction.

It may very well be that by some proper use of a knife and dismissal and dropping of parties, et cetera, et cetera, that you can carve it into a proper diversity law suit. You aren't going to be able to do it against any Delaware corporations I will tell you that, because there is dual citizenship and there isn't any way in the world you can sue a Delaware corporation. I will leave that issue open for a few days. It isn't going to make all that much difference.

How much time do you want to decide, to take counsel with yourselves and study the law and see how you want to handle that problem. What I am saying is unless there is some amendment in dropping of parties then I will have to dismiss the entire law suit. I will just have to.

MR. EHRENBARD: Your Honor, the main problem, it requires a certain amount of review.

THE COURT: I understand.

MR. EHRENBARD: Will you give me a few minutes?

THE COURT: Yes. In fact, I won't rush you for a decision, if you want to put this off for a few days. Let us know what you want to do. I think it's fair to give you a chance to digest it and also your adversary.

MR. EHRENBARD: Your Honor, would it be agreeable to you if we took twenty days with the option to respond even sooner if we can.

THE COURT: Okay. If you don't do anything after twenty days from today I will dismiss it, I will make an order of dismissal for want of jurisdiction. I am going to make an order dismissing the antitrust claim in any event. Then if you think you can excise this thing in some way to save jurisdiction you will have to take some action to do so within twenty days. Fair enough?

I don't mean you have to agree with the ruling but as far as timing is concerned.

MR. EHRENBARD: That will give us twenty days to consider what we want to do.

THE COURT: If you want to you can file some appropriate motion within that time or

maybe you don't even have to. Maybe you can do it by dismissal, voluntary dismissal, I don't know.

MR. COHN: As I understand what you are saying, you are saying you are dismissing it and giving us twenty days leave to amend.

THE COURT: I'm not even giving you leave to amend. I think if you seek leave to amend as it affects jurisdiction I ought to hear from these people. I am giving you twenty days to seek leave to amend.

MR. EHRENBARD: May I ask you this, your Honor: I think your Honor is not giving us leave to amend as to the first claim. Is it understood, however, your Honor, that if we wish to amend without including an antitrust claim that we may do so?

THE COURT: Do you object?

MR. WEISS: I would want to study the amendment before addressing that.

THE COURT: Let's put it this way: I am not going to make any decision on it except that if things are unchanged twenty days from now I am going to dismiss this case on my own motion. If you want to seek some kind of change in it and you can do it under the rules ex parte, do it; if it takes a motion, do it. I am not going to prejudge that issue. You may very well be able to voluntarily dismiss parties prior to answering and, therefore, save your law suit, I don't know. You may not even want to. You may want to keep it together and appeal and start a separate law suit in a state court and bring everybody together. These are policy decisions for you to make.

JUDGMENT SOUGHT TO BE REVIEWED

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

F I L E D
Mar. 18, 1981
JOHN P. HEHMAN, Clerk

No. 78-1287

CHRYSLER CORPORATION,

Plaintiff-Appellant,

vs.

FEDDERS CORPORATION, FEDDERS INTERNATIONAL CORPORATION, AIRTEMP CORPORATION, AIRTEMP INTERNATIONAL CORPORATION, FEDDERS WORLD TRADE CORPORATION AND INTERCLISA, S.A.,

Defendants-Appellees.

Before: EDWARDS, Chief Judge; MARTIN, Circuit Judge; and PHILLIPS, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for

the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in part and reversed in part and the case is remanded for further proceedings consistent with the opinion of this date.

Each party to bear own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ORDER ON REHEARING

No. 78-1287

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
MAY 6, 1981
JOHN P. HEHMAN, Clerk

CHRYSLER CORPORATION,

Plaintiff-Appellant

v.

FEDDERS CORPORATION, FEDDERS INTERNATIONAL CORPORATION, AIRTEMP CORPORATION, AIRTEMP INTERNATIONAL CORPORATION, FEDDERS WORLD TRADE CORPORATION and INTERCLISA, S.A.,

Defendants-Appellees

ORDER

Before: EDWARDS, Chief Judge; MARTIN, Circuit Judge; and PHILLIPS, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's opinion;

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk